Supreme Court, U. S.
FILED
DEC 2 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-1541

ROBERT REID and NADIA ALICE REID,
Petitioners,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF DANIEL PEREZ ECHEVERRIA AMICUS CURIAE FOR PETITIONERS

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BRIEF OF DANIEL PEREZ ECHEVERRIA AMICUS CURIAE FOR PETITIONERS

QUESTIONS PRESENTED

Whether aliens who were admitted to the United States based on a false claim citizenship made to an immigration officer at a port of entry at the Mexican border are entitled to relief from deportation under 8 U.S.C. §1251(f), where they are the parents of two minor United States Citizen children.

STATUTE INVOLVED

Section 241(f) of the Immigration and Nationality Act, 8 U.S.C. §1251(f) provides as follows:

> The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

INTEREST OF AMICUS CURIAE

Daniel Perez Echeverria is the respondent in the matter of *Immigration and Naturalization Service v. Daniel Perez Echeverria*, (Docket No. 73-1917) in which a petition for certiorari is presently pending before this Court. The issues presented in that case are virtually identical to those here and resolution of this case will inevitably resolve the *Echeverria* matter as well. In addition, Mr. Echeverria has a special interest in the deposition of this case. Mr. Echeverria is a Mexican laborer, who like the Reids, obtained entry to the United States by a false claim of citizenship at the Mexican border. However, as a Mexican national, Mr. Echeverria has a unique position in relation to this litigation since Mexican Nationals were the express intended beneficiaries of 8 U.S.C. §1251(f) when that section was originally adopted by Congress in 1957. Accordingly, Mr. Echeverria's position would not be adequately represented by petitioners.

All parties have consented to the filing of an *amicus curiae* brief by Mr. Echeverria.

SUMMARY OF ARGUMENT

Simply stated, the majority decision below is a surrender to statistical, legislative policy arguments which, in addition to being specious in most instances, are irrelevant in a court of law.

8 U.S.C. §1251(f) ("§241(f)" hereinafter) was adopted by Congress in 1957 for the specific humanitarian purpose of keeping families together and avoiding the human suffering and hardship which naturally would flow from forced deportation of a father or other immediate member of a United States family. It was originally enacted as §7 of the Immigration and Nationality Act Amendments of 1957, Pub.L.. 85-316, 71 Stat. 639 (1957), and its substantive provisions have remained unchanged since that time. *Immigration and Naturalization Service v. Errico,* 385 U.S. 214, 223 (1966).

Section 241(f) was adopted by Congress because of an express concern for a large number of primarily[1] Mexican aliens who have been tacitly encouraged to enter the United States over the years

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[1]While Mexican Nationals were the principal reason for the adoption of §241(f), its provisions are not limited to them. *Errico, supra,* 385 U.S. 214. 224.

because of laxity of administrative enforcement at the Mexican border. H.R. Rep. No. 1199, 85th Cong., 1st Sess., p. 11, U.S. Code Cong. & Admin. News, 1957, p. 2024. *Errico, supra,* 385 U.S. 214, 224-225.

In *Errico,* the only previous decision of this Court interpreting §241(f), the Court was faced with the question of whether aliens from quota countries, who had made false representations regarding their marital or labor skill status in order to avoid quota restrictions, were also eligible for relief from deportation under §241(f). The Immigration and Naturalization Service ("Service" hereinafter) argued that since §241(f) was in obvious conflict with screening procedures set up elsewhere in the Immigration laws, it should be strictly construed against aliens. The Service urged, therefore, that the phrase "otherwise admissible" should be construed to deny relief to aliens who were "quantitatively" inadmissible at the time of their entry because the quota for their country of origin was oversubscribed.

Errico met this argument squarely and summarily rejected it. After an extensive review of the language and legislative history of §241(f), and its obvious conflict with screening provisions contained elsewhere in the Act, the Court dispositively concluded that the humanitarian purpose of the statute was dominant, that any ambiguous language or conflict should be resolved in favor of the alien, and that "otherwise admissible" should therefore be construed to refer only to generally applicable moral, mental or physical disabilities and not to mere "quantitative"

inadmissibility at the time of entry. *Errico, supra,* 335 U.S. 214, 225.

The instant case raises the question whether §241(f) also applies to an alien who obtained entry to this country by a false claim of citizenship made to an Immigration officer at a port of entry on the Mexican border; or whether, as the Service contends, §241(f) should be limited to aliens who have actually obtained a visa from a U.S. consulate and entered on the basis of that visa, as in *Errico.*

This is a question of first impression in this Court; but of *five* separate federal appellate decisions which have considered the same question, only the Second Circuit in the divided opinion below has agreed with the Service. (For decisions holding that §241(f) *is* applicable to entries by a false claim of citizenship, see *Lee Fook Chuey v. Immigration and Naturalization Service,* 439 F.2d 244 (C.A.9, 1971); *Echeverria v. Immigration and Naturalization Service* (Opinion unpublished) C.A.9, Feb. 27, 1974, (Petition for Cert. presently pending before this Court, No. 73-1917); *Gonzalez de Moreno v. United States Immigration and Naturalization Service,* 492 F.2d 532 (C.A.5, 1974); *Gonzalez v. Immigration and Naturalization Service,* 493 F.2d 461 (C.A.5, 1974).

The majority opinion below, while admitting that a literal interpretation of §241(f) would apply to an entry by a false claim of citizenship at a port of entry,[2] refused to apply this literal meaning because

[2] *Reid v. Immigration and Naturalization Service,* 492 F.2d 251, 253 (C.A.2, 1974).

of what it perceives to be the Congressional intent in adopting §241(f).

The opinion is not clear as to which word, clause or phrase the Court is in fact construing in denying §241(f) relief to the Reids. But in essence the Court argues that it is justified in amending the statute because:

(1) A literal reading of the statute would conflict with the visa applicant screening procedures set up elsewhere in Federal immigration law;

(2) It will be more difficult to retroactively determine whether an alien seeking §241(f) relief was "otherwise admissible" at the time of entry where that alien has not originally submitted himself to visa applicant screening procedures; and

(3) The logistics of our contiguous land border with Mexico make it impossible to adequately inspect an alien seeking entry on a false claim of citizenship.[3]

[3]The opinion actually makes one additional argument worthy of at least brief mention: That §241(f) should not be literally construed since there is alternative relief available to the Reids under other sections of immigration law. *Reid, supra*, 492 F.2d 251, 258. The general tone of the *Reid* opinion indicates that this argument is a justification for the result, rather than the reason for it, but in any event it is quickly and simply answered.

With regard to alleged alternative relief, the Court below cites 8 U.S.C. §§1182(e) and (h) and 8 U.S.C. §1254. Of these sections, the first two have no relevance whatever. 8 U.S.C. §1182(e) relates only to discretionary relief available to aliens here on student visas pursuant to 8 U.S.C. §1101(a)(15)(J). And 8 U.S.C. §1182(h) relates only to discretionary relief from *exclusion* (not deportation) for aliens *outside* the United States with family *inside*. This latter was a companion provision adopted along with §241(f) in §7 of the 1957 Amendments and can hardly be argued to be a substitute for it. Finally, suspension of deportation under 8 U.S.C. §1254 is limited to aliens who: (1) have seven years continuous residence in the United States; and (2) are of "good moral character." Neither of the Reids have been here seven years; and in any event the cases construing §1254 have held that a false statement to an Immigration official negates a finding of "good moral character." *Orlando v. Robinson*, 262 F.2d 850 (C.A.7, 1959); *Arakas v. Zimmerman*, 200 F.2d 322 (C.A.2, 1952). So the very fraud which triggers §241(f) in the first place would make §1254 relief unavailable.

We disagree in every respect. We submit that the meaning of §241(f) is explicit on its face and not susceptible of the interpretation given by the Court below. Secondly, the Congressional history, to the extent it is relevant, supports, rather than contradicts, a literal and humanitarian application of the statute. Third, far from being a justification for judicial amendment of §241(f) the Mexican border was the primary reason §241(f) was adopted in the first place.

In short, the language and legislative history of the statute are clear and unequivocal and the proper forum for the Service's arguments, if any, is in Congress.

ARGUMENT

I

THE APPLICABILITY OF §241(f) TO AN ENTRY BY A FALSE CLAIM OF CITIZENSHIP IS CLEAR AND EXPLICIT ON THE FACE OF THE STATUTE. ACCORDINGLY, JUDICIAL CONSTRUCTION OF THE STATUTE IS INAPPROPRIATE REGARDLESS OF ALLEGED CONGRESSIONAL INTENT.

By its express terms, §241(f) grants relief from deportation to "otherwise admissible"[4] aliens with close family ties in the United States,

[4]Since this Court's 1966 decision in *Errico, supra*, 385 U.S. 214 it has been settled that "otherwise admissible" within the meaning of §241(f) refers only to generally applicable "qualitative" inadmissibility at the time of entry. *Id.* 385 U.S. 214, 225;

". . . who have sought to procure, *or* have procured visas *or* other documentation, *or entry* into the United States by fraud or misrepresentation . . ." (emphasis supplied).

There is no "family ties" issue here; nor is there any evidence or contention that either Mr. or Mrs. Reid were "qualitatively" inadmissible at the time of their entry. *Reid, supra,* 492 U.S. 251, 260. The only issue therefore is whether an entry procured by a false claim of citizenship to an immigration officer at a port of entry is an "entry"[5] within the meaning of §241(f). Clearly, it is.

The statute does not say "entry by an alien inspected as an alien" as implied by the majority opinion below.[6] Nor is it limited to aliens who obtain *both* a visa *and* entry. Its language is disjunctive not conjunctive; so the effect of the opinion below is an impermissible judicial amendment which effectively excised from the statute the words "or other documentation or entry."[7] *Reid, supra,* 492 F.2d 251, 262

Godoy v. Rosenberg, 415 F.2d 1266, 1270-1271 (C.A.9, 1969); *Lee Fook Chuey, supra,* 439 F.2d 244, 246 (C.A.9, 1971); *Gonzalez de Moreno, supra,* 492 F.2d 532, 538 (C.A.5, 1974).

[5]"Entry" within the meaning of the Immigration and Nationality Act is defined by 8 U.S.C. §1101(a)(13) as being *"any coming"* of an alien into the United States from a foreign port or place or from an outlying possession, whether voluntary or otherwise, . . ." (emphasis supplied)

[6]*Reid, supra,* 492 F.2d, 251, 259-260.

[7]It is a settled maxim of statutory construction that where the language of a statute is clear and unambiguous, the words of the statute are controlling regardless of any alleged legislative intent to the contrary. *Reid, supra,* 492 F.2d 251, 262 (dissenting opinion of Judge Mulligan); *Wisconsin R.R. Comm'n v. Chicago, B. & Q. R.R.,* 257 U.S. 563, 589 (1922); *Holtzman v. Schlesinger,* 484 F.2d 1307, 1314 (C.A.2, 1973). Nor is this

(dissenting opinion of Judge Mulligan); *Gonzales de Moreno, supra,* 492 F.2d 532, 536-537.

II

THE OVERRIDING INTENT OF CONGRESS IN ENACTING §241(f) WAS HUMANITARIAN AND ANY AMBIGUITY OR ALLEGED CONFLICT WITH OTHER PROVISIONS OF IMMIGRATION LAWS IS TO BE RESOLVED IN FAVOR OF THE ALIEN AND FAMILY UNITY.

As noted above, the Court below candidly admits that a literal reading of §241(f) would grant relief to the Reids. *Reid, supra,* 492 F.2d 251, 253. But it then denies such relief based on its conclusion that Congress could not have intended such a result since this would undermine "the integrity of the immigration visa and inspection procedure . . ." *Id.* 492 F.2d 251, 260.

Court's construction of §241(f) in *Errico* a justification for deviation from the literal meaning of the statute as argued by the majority below. *Errico* held that §241(f) should apply not only to aliens who were excludable at entry under 8 U.S.C. §1182(a)(19) but also to those aliens who were excludable at entry under 8 U.S.C. §1182(a)(20) and (21). The reasoning of the Court was simple. Any alien excludable at entry under subsection (19) for having procured a visa or other documentation or entry by fraud would *a fortiori* be excludable under either sub-section (20) or (21) as well for having entered without inspection or lawfully issued documents. So to limit §241(f) coverage to sub-section (19) would allow the Service, by artful selection of the deportation charge, to avoid application of §241(f) in every instance. The *Errico* ruling was simply a clarification of the obvious intent of Congress to avoid rendering the statute a total nullity; and this is a long-recognized exception to the maxim of strict statutory construction. *U.S. v. Howell,* 78 U.S. 432 (1870); *United States v. Raynor,* 302 U.S. 541, 547 (1938).

This decision ignores not only the words of the statute and the express legislative history but also the explicit and dispositive ruling of this Court in *Errico*.

Section 241(f) was originally adopted as part of the Immigration and Nationality Act Amendments of 1957 ("1957 Act" hereinafter) and must be viewed in that context. Unlike many previous Congressional enactments on the subject of immigration,[8] the 1957 Act was not restrictive but uniformly humanitarian in purpose. It was intended to alleviate many of the harsh provisions of the 1952 Act based on a Congressional conclusion that . . .

> "It was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country." *Errico, supra,* 385 U.S. 214, 220.

And, nowhere in the statute or legislative history is there the slightest indication that Congress intended or was even aware of the distinction suggested below between visa-bearing aliens and aliens who enter by a false claim of citizenship at the border. *Gonzalez de Moreno, supra,* 492 F.2d 532 at 536-537. If anything, the legislative comment accompanying §241(f) indicates to the contrary since it identified a primary concern with "border control"

[8]For a brief history of the growth of qualitative and quantitative restriction on immigration of aliens leading up to 1957, see generally, *Waiver of Deportation: An Analysis of Section 241 (f) of the Immigration and Nationality Act,* 4 Calif. W.Int'l L.J. 271, 275-280 (1974).

laxity, not visa-granting laxity.[9] H.R. Rep. No. 1199, 85th Cong. 1st Sess. p. 11, U.S. Code Cong. & Admin. News, 1957, p. 2024.

Finally, every argument raised by the majority below in relation to Congressional intent was considered at length and disposed of by *Errico*. *Errico* reviewed the history of §241(f) specifically and the 1957 Amendments generally and concluded that despite the obvious conflict with other provisions of immigration law the humanitarian intent of Congress was dominant and that any ambiguity or conflict should be resolved in favor of the alien and in furtherance of the overriding purpose . . .

[9]The opinion below makes a bootstraps argument that because it will be more difficult to retroactively determine admissibility at the time of entry when an alien has not gone through visa-applicant screening, §241(f) should be construed not to have been intended to relate to entry by a false claim of citizenship. *Reid, supra,* 492 F.2d 251, 257. There are three answers to this argument. First, by its very nature §241(f) contemplates a retroactive proceeding. Second, the fact of having gone through visa-screening will almost always be meaningless in a §241(f) proceeding anyway; for if there were something in the visa-application file that would help prove the alien inadmissible at the time of entry he never would have been admitted in the first place. *Lee Fook Chuey, supra,* 439 F.2d 244, 250; *Gonzalez de Moreno, supra,* 492 F.2d 532, 537. Finally, the "qualitative" grounds of excludability which would support a denial of §241(f) relief are not nearly as elusive of retroactive proof as the *Reid* majority suggests. Physical disabilities (§1182(a)(1)-(7), e.g.) are ongoing in nature and thus easily proven. Criminal disabilities (§1182(a)(8) and (9), e.g.) are matters of public record with or without visa-screening. And even the "public charge" aliens excludable under §1182(a)(15) (the only example cited in *Reid*) pose little problem. For if they actually become a public charge that will be a matter of record and they will most likely be deportable under §1251(a)(8). And if they don't become a public charge then they probably weren't likely to in the first place.

". . . of preventing the breaking up of families composed in part at least of American citizens, . . ." *Errico, supra,* 385 U.S. 214, 225.

Viewed in the light of this history, the result below simply cannot stand. For where the *Errico* decision resolved an admittedly ambiguous provision of §241(f) in favor of the alien and the Congressional purpose of preserving family unity, the *Reid* opinion "creates doubt where the statute speaks with seeming clarity" and then resolves that doubt *against* the alien. *Gonzalez de Moreno, supra,* 492 F.2d 532, 537; *Reid, supra,* 492 F.2d 251, 262 (dissenting opinion of Judge Mulligan).

III

CONTRARY TO THE SERVICE'S CONTENTION THE MEXICAN BORDER, FAR FROM BEING AN ARGUMENT FOR RESTRICTIVE INTERPRETATION OF §241(f), WAS THE EXPRESS AND PRIMARY PURPOSE FOR THE ADOPTION OF §241(f) IN THE FIRST PLACE.

The Congressional intent with regard to the applicability of §241(f) to the Mexican border could not be clearer. The House Report accompanying §7 of the 1957 Act identifies the primary beneficiaries of §241(f) as being:

". . . mostly Mexican Nationals who, during the time when border-control operations suffered from regrettable laxity were able to enter the United States [and] establish a family in this country . . ." H.R. Rep. No. 1199, 85th Cong., 1st Sess., p. 11, U.S. Code Cong. & Admin. News 1957, p. 2024.

Secondly, the Service's argument that it is impossible to adequately inspect an alien at the Mexican border on a false claim of citizenship is simply not true.

The Service has plenary power under 8 C.F.R. §235.1 to summarily reject a claim of citizenship, inspect the applicant as an alien and exclude him from entry pending an exclusionary hearing before an Immigration Judge pursuant to 8 U.S.C. §1225.[10]

Or, less drastically, the Service could certainly require that returning citizens present birth certificates, driver's licenses, social security cards or other documentation in support of a claim of citizenship. And a cursory examination of such documents would hardly "paralyze" international travel as suggested by the *Reid* majority.[11]

If the Service does not exercise these powers it is not because it cannot do so, *but because it has chosen not to.* Our Mexican border is and traditionally has been open because the Service has deemed laxity of enforcement at the Mexican border to be in the best interests of our country, particularly our domestic farm economy.[12]

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[10]So complete is the power of the Service in this respect that not even the judicial writ of habeas corpus is available to an excluded citizen outside the United States. *Ng Yip Yee v. Barber,* 210 F.2d 613 (C.A.9, 1954) cert. den. 347 U.S. 988.

[11]*Reid, supra,* 492 F.2d 251, 256.

[12]*Bustos v. Mitchell,* 481 F.2d 479 (C.A.D.C. 1973) (presently under submission to this Court as *Richardson v. Bustos,* Docket No. 73-300); *Gooch v. Clark,* 433 F.2d 74 (C.A.9, 1970) cert. den. 402 U.S. 995.

And this, we submit, is the very administrative laxity of enforcement which Congress was concerned with when it adopted §241(f) in the first place.

Bustos deals with a challenge to the Service's long-standing administrative practice of allowing alien commuters to reside in Mexico and enter the United States on a daily or seasonal basis with only a cursory inspection of a laminated "I-151" green card,[13] but an understanding of that practice and the reasons behind it is essential to understanding the history of §241(f) as it relates to the case at bar.

This "green-card" system has its origins in an informal . . .

> ". . . border crossing system of the nineteenth and early twentieth centuries as a result of which aliens living in Canada and Mexico, as well as United States citizens living in the United States, were able to travel freely into the adjoining country for pleasure, for business or for employment." *Bustos, supra,* 481 F.2d 479, 485.

More recently, the primary impetus for continuation and expansion of the green-card system has been the lack of domestic farm-laborers in the United States. The Service admits that it has freely expanded the "green-card" system *by administrative fiat* because of an increased need for farm-workers since Congress terminated the "bracero" program in 1964. *Id.* 481 F.2d 479, 482.

[13]Specifically, the plaintiffs in *Bustos* argue that every "re-entry" by a green-card commuter should constitute an original "entry" within the meaning of 8 U.S.C. §1101(a)(13) and should therefore be subject to the labor certification requirements of 8 U.S.C. §1182(a)(14).

So, cursory inspection of green-cards, like cursory inspection of claims of citizenship, is an administrative practice which has grown not because it was Constitutionally or statutorily mandated, but because the Service has perceived it to be in the best interests of our Country. American agriculture needed farm-workers; and a free and open border was the way to get them.

Viewed in this context, the purpose of Congress in relation to §241(f) and the Mexican border comes into sharp focus. Far from being an anomalous attempt to "reward fraud" as the Service delights in arguing, §241(f) is an equitable statute specifically designed by Congress to forgive the relatively insignificant fraud of qualitatively admissible farm workers and other laborers who have come to this Country at the tacit invitation of the Service and in furtherance of our Country's economic and diplomatic interests.

Whatever its relationship to immigration law generally, §241(f) is an integral and express part of our country's delicate diplomatic relations at the Mexican border. And as then Secretary of State William P. Rogers stated in an affidavit opposing termination of the "green-card" system in *Bustos,* adjustment to those diplomatic relations are better fashioned by legislative or administrative processes, and not by the courts.[14]

Without commenting on the merits of *Bustos* one way or the other, we would observe that if judicial

[14]*Bustos, supra,* 481 F.2d 479, 487 (footnote 26)

abstention is appropriate there, in support of an administrative practice which admittedly "strains the language" of the statute[15] it is particularly appropriate in the case at bar where the words of the statute and the Congressional intent are clear.

CONCLUSION

It is submitted, therefore, that the *Lee Fook Chuey* doctrine is good law and constitutes nothing more than continued application of the express language and humanitarian purpose of §241(f) as enunciated by this Court in *Errico*.

The decision below is wrong for all the reasons set forth in Judge Mulligan's dissent and in the subsequent unanimous 5th Circuit decision in *Gonzalez de Moreno, supra*.

The decision below should be reversed, and the Ninth Circuit decision in *Echeverria* (No. 73-1917) should be summarily affirmed.

Respectfully submitted,

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November 27, 1974

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[15] *Gooch v. Clark, supra*, 433 F.2d 74, 80.